1995

Dianna Broadbent v. Board of Education of the Cache County School District : Reply Brief

Utah Court of Appeals

Michael T. McCoy; Attorney for Appellant.
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IN THE UTAH COURT OF APPEALS

DIANNA BROADBENT, Plaintiff/Appellant, v. BOARD OF EDUCATION OF THE CACHE COUNTY SCHOOL DISTRICT, Defendant/Appellee.	)	Case No. 950241-CA 930000119

REPLY BRIEF OF APPELLANT

Appeal from the First Judicial District Court for Cache County
Judge Gordon J. Low

Rule 29(b) Priority Classification: 15

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RELEVANT STATUTORY PROVISIONS

The relevant statutory provisions are set forth in the initial Appellant's Brief and Appellee Brief.

SUMMARY OF ARGUMENT

The issues in this case are: (1) whether this Court should overrule or modify its decision in Peterson v. Browning, 832 P.2d 1280 (Utah 1992); (2) whether the Utah Education Evaluation Act, Section 53A-10-101 et seq., Utah Code Annotated 1953, (herein "EEA") creates a private right of action by educators where a school district fails to comply with the requirements of the EEA; (3) whether Plaintiff/Appellant (herein "Plaintiff") is entitled to reinstatement even if her claim for damages is barred by governmental immunity; and (4) if the EEA creates a private right of action, is the Utah Governmental Immunity Act, §§ 63-30 1 et seq., Utah Code Annotated 1953 , a defense as suggested by Defendant/Appellee (herein "Defendant").

ARGUMENT

POINT I

PLAINTIFF IS ENTITLED TO REINSTATEMENT EVEN IF THE COURT DOES NOT MODIFY OR OVERRULE PETERSON V. BROWNING

Defendant argues that the public policy exception to the employment at-will doctrine sounds in tort and therefore Plaintiff's claims are barred by the Governmental Immunity Act, Section 63-30-1 et seq., Utah Code Annotated 1953. The arguments for overruling or modifying Browning are set forth in Plaintiff's Brief. However, whether or not this Court overrules or modifies Browning, Plaintiff submits that her Complaint seeks damages and reinstatement for wrongful discharge. Plaintiff's Complaint, p. 5. (R. 6)

It is well established that the Governmental Immunity Act is not a defense to equitable

claims. See, e.g., Bowles v. State ex rel. Department of Transportation, 652 P.2d 1345 (Utah 1982).

Reinstatement is an equitable remedy. Thurston v. Box Elder County, 260 Utah Adv. Rep. 22, 1995 WL 130055 (Mar. 24, 1995), ___ P.2d ___ (Utah 1995). Accordingly, governmental immunity is no defense to Plaintiff's requested reinstatement, although it may bar monetary damages. Thus, Plaintiff is entitled to have her case for wrongful discharge heard on the issue of reinstatement.

POINT II

PLAINTIFF CANNOT BE DISCHARGED FOR REASONS CONTRARY TO LAW WHETHER OR NOT SHE IS A PROVISIONAL EMPLOYEE

A. The Utah Educator Evaluation Act is a Limitation on the Authority of School Boards to Terminate Educators' Employment Contracts and Creates a Private Right of Action to Enforce those Rights.

In our Brief of Appellant ("Initial Brief"), we demonstrated that the EEA creates a private right of action. Specifically, we explained that this Court in Griffin v. Memmott, 814 P.2d 601 (Utah App. 1991), established a test to determine whether a statutory scheme creates a private right of action. The application of the Griffin test to the comprehensive statutory scheme for identifying, notifying and remediating provisional educators indicates a legislative intent to create in a provisional educator a private right of action to enforce the requirements of the statute.

In response, Defendant suggests that provisional educators may be discharged for "any reason, or for no reason at all." Appellee's Brief, p. 7. There are, of course, many reasons provisional employees may not be lawfully discharged. Among those reasons are the public policy exceptions listed in Peterson v. Browning, 832 P.2d 1280 (Utah 1992) at 1281-82. Educators

may not be terminated for exercising First Amendment rights. See Pickering v. Board of Education, 391 U.S. 563 (1968) (holding that an educator may not be terminated for criticizing the way in which his superintendent and school board raised and spent money); McLaughlin v. Tilendis, 398 F.2d 287 (7th Cir. 1968) (holding that two probationary teachers could not be dismissed because they joined a union and that they had a right of free association); Burris v. Willis Independent School District, 713 F.2d 1087 (5th Cir. 1983) (holding that although a school board may refuse to renew a teacher's contract for any legitimate reason, it may not do so in retaliation for the teacher's support for and association with former school board members). Nor may educators, provisional or otherwise, be terminated because they are women, black, pregnant, over age 40, or handicapped. See Section 34-35-6, Utah Code Annotated 1953. There are many restraints on the authority of local boards of education to terminate employees. The limitations are found in federal and state constitutions, in federal and state laws, and in judicial decisions. The EEA is an additional limitation on the authority of local boards of education to terminate provisional educators "for any reason, or for no reason at all."

To avoid Plaintiff's argument that the EEA provides specific benefits to provisional educators, Defendant argues that the primary purpose of the EEA is to "protect school authorities from claims of negligence in hiring or retaining incompetent or otherwise unsuitable teachers." Defendant's Brief, p. 15. Defendant makes its primary purpose argument because Cort v. Ash, 422 U.S. 66, 45 L. Ed 26, 95 S. Ct. 2080 (1975), at 422 U.S. 84 holds that no private right of action is created absent an express statement of legislative intent where it is only a secondary purpose to protect a specified class of persons.

Nothing in the EEA or the record supports Defendant's effort to argue that the primary

purpose of the EEA is the protection of school districts from negligent hiring and Defendant provides no reference to case law or statute in support of its assertion. Indeed, it is difficult to read into the EEA anything to do with negligent hiring of employees as evaluations and remediation take place after hiring occurs. Plaintiff does, however, agree that the EEA impacts the retention of both provisional and continuing contract educators.

Defendant also states that Plaintiff is not entitled to EEA protection because "[c]onspicuously absent is language requiring the District to attempt to remediate a provisional teacher who is considered insubordinate."[1] Defendant's Brief, p. 15. However, the EEA contains several provisions which apply specifically to provisional educators and require remedial efforts for those provisional educators whose performance is identified as inadequate. As we demonstrated in our Initial Brief, these specific provisions indicate a legislative intent to create a private right of action. Plaintiff submits that if the primary purpose of the EEA was to improve school district's evaluation programs or protect from claims of negligent retention, the EEA would not have in its provisions such detailed rights and projections for provisional educators. See Brief of Appellant, pp. 12-13.

Defendant may have attempted to insert the insubordination argument into this case for the reason that courts have held that insubordination is not remediable. Board of Education of Chicago v. Harris, 578 N.E. 2d 1244 (Ill. App. Ct. 1991). Plaintiff showed in her Initial Brief that the actions of Plaintiff in advocating for a special education student are acts protected by federal law. Further, during the investigation by the Office of Civil Rights Compliance, Defendant

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[1]It is noteworthy that the Defendant asserts as evidence of Plaintiff's irremediable insubordination conduct which Plaintiff was required by federal law to perform. See Plaintiff's Brief, p. 26. In any event, Plaintiff is entitled to present evidence at trial as to whether or not her conduct is irremediable.

specifically denied that the Defendant terminated Plaintiff's employment because she had advocated for the placement of J. B. in a special education program. See Plaintiff's Complaint p. 3, ¶ 13; and letter from the Office of Civil Rights dated April 9, 1993 attached in Addendum C.

The weakness of Defendant's arguments are found in the cases and authorities cited by it for the proposition that the EEA provides no protection to provisional educators. Defendant argues that Hopp v. Oroville School District No. 410, 639 P.2d 872 (Wash. App. 2d 1982), attached in Addendum A, holds that probationary teachers acquire no rights under the Washington Educator Evaluation law. (The Washington law is not included with Defendant's Brief). In holding that the Washington Evaluation Law did not apply to provisional educators, the court cited a section of Washington law relating to the termination of provisional teachers:

> This section provides the exclusive means for nonrenewing the employment contract of a provisional employee and no other provision of law shall be applicable thereto.

(Emphasis original.) Id. at 875. The court held that because the foregoing statute was enacted after the evaluation law, the legislature had expressly precluded the provisions of the evaluation law from applying to the termination of provisional teachers.

Unlike the Washington law, Utah has no preemptive language. Additionally, the EEA clearly defines the rights of provisional educators while the Washington scheme addressed "all employees." The Washington court concluded that the failure of the legislature to specifically mention probationary teachers in the evaluation law was "good reason to believe the probationary requirements of (the evaluation law) do not apply to provisional teachers." Id. at 875-76.

The EEA, in contrast to the Washington law, clearly identifies the rights of provisional educators. Thus, Hopp does not support Defendant's position, but instead suggests the

conclusion that where the statute specifically mentions provisional employees, it provides protection to that class of individuals.

In Roberts v. Lincoln County School District Number One, 676 P.2d 577 (Wyo. 1984), cited by Defendant, the plaintiff, a provisional teacher, claimed that the board's failure to follow its own evaluation procedures was arbitrary and capricious. The evaluation policy of the Lincoln County School board read:

> Formal evaluations for nontenure teachers shall be made at least four times each year on forms to be provided. The first two evaluations shall be completed before December, and the second two before March of each school year.
>
> The minimum basic procedures leading to formal evaluations of teachers shall include the following:
>
> 1. The principal or his designated representative (assistant principal, district administrator, and/or supervisor) shall visit each teacher in the classroom several times during each school year and shall record the general nature of visitations on a form to be provided, with a copy for the teacher and the principal. All observations shall be conducted openly and with the full knowledge of the teacher. A teacher or the principal or his designated representative may request a conference to discuss the visit.
>
> 2. At least once each year in the case of tenure teachers, and at least twice each year in the case of nontenure teachers, the principal or his designated representative shall schedule a formal evaluative interview with each teacher prior to the evaluation deadlines established.

Nowhere in the Lincoln policy are provisional teacher rights identified. The language is minimal and focuses its direction to the principal or his designated representative to conduct evaluations.

Not surprisingly, the Roberts court held, "[i]n this case, the regulations establishing evaluative policies were not designed for the protection of nontenured teachers such as appellant, but were primarily for the benefit of the school district in performing its operational and

supervisory duties." Id. at 581. [2]

The Wyoming court also held that as Ms. Roberts was dismissed for reasons unrelated to her teaching responsibilities, and the district's evaluation procedures adopted by the board related to classroom duties, the evaluation did not relate to the decision to terminate Plaintiff as that decision was based on her coaching duties. Id. at 581. Roberts is attached in Addendum A.

Leonard v. Converse County School District No. 2, 788 P.2d 1119 (Wyo. 1990), is a restatement of Roberts, supra, with a twist. The complaint in Leonard alleged that both the policies of the school district section of Wyoming state law "required that initial contract teachers be evaluated in writing twice a year and receive copies of their evaluations." Id. at 1119. The language of the statute under which Leonard was decided is much more succinct than the contract language in Roberts.

The court dismissed Ms. Leonard's complaint citing Roberts, supra, and finding that both the statute and the district's evaluation policy were for the "benefit of the school district in performing its operational and supervisory duties." Ibid. Leonard is attached in Addendum A.

Neither Roberts nor Leonard support Defendant's claim that the EEA does not apply to provisional educators for the reason that the Lincoln and Converse County school district policies lack any reference to the rights of provisional educators. The language of the statute and the policies are what the Wyoming court construed them to mean: internal directions to

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[2] Because Roberts involved the board of education's interpretation of its own policies, the court adopted the standard of review that it would only "interfere with school board actions if they are arbitrary and capricious or fraudulent; however, we will not otherwise substitute our judgment. Absent abuse, we will not interfere with the exercise of discretionary acts authorized by statute." Roberts, 676 P.2d 557, 580. This is not the standard of review this Court must apply. Where the Court is asked to construe the meaning of a state law, it reviews questions of general law "under a correction of error standard, giving no deference to the agency's decision." Questar Pipeline Co. V. State Tax Commission, 817 P.2d 316, 318 (Utah 1991).

administrators. Unlike the Lincoln and Converse County policies and the Wyoming teacher evaluation law, the EEA specifically sets forth the rights of provisional educators and, among other things, require that Plaintiff be advised regarding her alleged deficiencies and be given an opportunity to remediate. Roberts, supra.

Defendant's citation to Schofield v. Richland County School District, 447 S.E. 2d 189 (S.C. 1994), is also misplaced. Schofield was decided after a bench trial. The trial judge found that the teacher's deficiencies were not areas included in the evaluation program. The trial judge concluded that, "the School District may refuse to renew the contract of a provisional teacher on the basis of performance concerns that arise independent of the statutory evaluation and remediation procedures." Id. at 190. The court held at 447 S. E. 2d 191:

> The plain language of section 59-26-40 requires the School district to provide remedial assistance only in those areas in which deficiencies are noted during the three required classroom evaluations. Here, Teacher's contract was not renewed based on performance concerns that arose *independently* of the evaluation process.

(Emphasis original.)

The Schofield court also noted that the evaluation law specifically stated, "[i]f the evaluation indicates that the provisional teacher has performed in an adequate manner, the teacher is eligible for an annual contract." Id. at 191. The court emphasized that the statute used the phrase "eligible" for an annual contract, not that the teacher was entitled to an annual contract.

Plaintiff submits that the law of Schofield entitles her to have the issue of whether the Defendant's evaluation program would have addressed the "real reasons" for which her employment with Defendant was not renewed and whether those deficiencies are remediable.

Defendant's citation to O'Rourke, M., Nonrenewal of Teacher Contracts: A Primer on South Dakota Statutory and Case Law, 39 So. Dak. L. Rev. 237 (1994), is most helpful. Two

pages address teacher evaluation. Those pages are attached in Addendum B. The section on teacher evaluation reads in part:

> In Schaub, a nontenured, nonrenewed teacher sought reinstatement to her position based on allegations that the school board did not follow its own rules in regard to teacher evaluations. The court stated that it was unclear whether the board had violated any of its own evaluation policies, but that it was clear from the record that Schaub knew "that the Board was concerned with certain deficiencies in her teaching." In any event, the court reiterated a test with regard to reinstatement under these circumstances:
>
> > [A] violation by the Board of a rule does not in and of itself justify reinstatement of the teacher. The test in determining whether reinstatement is the proper remedy for a violation of teacher evaluation statutes is "whether a grievant has shown that the violation substantially and directly impaired his or her ability to improve himself or herself and attain continuing contract status."
>
> The court held that since Schaub had prior knowledge of her deficiencies, and had ample opportunity to correct them before her termination notice, any violation by the school board of teacher evaluation policies did not "substantially or directly impair" the teacher's ability to improve herself.

Id. at p. 262.

The O'Rourke article clearly supports Plaintiff's argument that the Defendant's failure to truthfully advise her of deficiencies in her performance "substantially and directly" impaired her ability to improve herself and entitles Plaintiff to have the fact issue of whether the District's complaints about Plaintiff were remediable.

B. Plaintiff's Claim for Violations of the Education Evaluation Act are not Barred by the Governmental Immunity Act .

Defendant states that an action brought to remedy a violation of the EEA sounds in tort and is therefore immunized. Plaintiff has previously argued that this cause of action is more in the nature of a contract violation and is therefore not subject to the requirements of the Utah Governmental Immunity Act. See Appellant's Brief, pp. 23-24. It is elementary hornbook law

that:

> The necessity of a special duty owed the plaintiff by the governmental body whose acts or omissions are alleged to have caused him injury or damage may be deemed satisfied where the conduct of the public entity violated a statute or ordinance enacted for the benefit of the class of persons to which the plaintiff belonged. Thus, a statute imposing a mandatory duty on a municipality through its officers or employees, and requiring action not only for the protection of the general public but more particularly for the benefit of those persons or class of persons within the ambit of the danger involved, provided a basis for municipal liability where immunity had been abrogated by statute for those functions not involving executive or administrative discretion. One court observed that whether the public duty doctrine would exculpate the government from liability was irrelevant where the facts showed a special duty owed under law to a class of persons to which the injured party belonged.

57 Am Jur 2d, Municipal, School, and State Tort Liability, § 143.

Defendant's argument that the Governmental Immunity Act is a defense in this case is an attempt to apply Peterson in the area of statutory duty. If the EEA does not create a private right of action, then Defendant's argument that Plaintiff's cause of action sounds in tort may be correct. But if as we have shown the EEA does in fact create a private right of action, the Governmental Immunity Act does not apply under either the breach of contract theory or the theory that governmental immunity is waived where a statute is enacted "for the benefit of the class of persons to which plaintiff belonged." Id. at 57 Am Jur 2d § 143.

Accordingly, Defendant's contention that Governmental Immunity bars suits brought by provisional educators under the EEA is without merit.

CONCLUSION

The trial court erred in granting Defendant summary judgment. The EEA creates a private right of action. This case should be remanded to determine whether the Defendant substantially complied with the requests of the EEA, whether the Defendant's failure to comply with the requests of the EEA substantially and directly impaired Plaintiff's ability to improve herself, and

whether any of the reasons for her nonrenewal were not remediable. Additionally, Plaintiff is entitled to have her case heard by the trial court on the issue of reinstatement.

DATED this 12th day of May, 1995.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that two true and accurate copies of the foregoing **REPLY BRIEF OF APPELLANT** were mailed this 12th day of May, 1995, postage prepaid, to:

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ADDENDA

ADDENDUM A

RCW Title 9 was repealed by implication. Yet the unambiguous language of RCW 9A.04.010(3) states that Cook could be prosecuted under the former criminal provisions as if the new criminal code had not been enacted. Although not part of a repealing act, the provision expresses the intent of the legislature and cannot be ignored.

The judgment and sentence is affirmed.

CORBETT and SWANSON, J., concur.

31 Wash.App. 184

Erik L. HOPP, Appellant,

v.

OROVILLE SCHOOL DISTRICT NO. 410, Respondent.

No. 4194-III-8.

Court of Appeals of Washington, Division 3, Panel Four.

Jan. 21, 1982.

Rehearing Denied March 12, 1982.

Provisional high school teacher appealed from a decision of the Superior Court, Okanogan County, B. E. Kohls, J., which denied his writ of certiorari to review a decision of the school district which refused to renew his contract. The Court of Appeals, McInturff, C. J., held that: (1) provisional employees statute, which applied alike to all first-year teaching or noncertificated employees in school district, had a rational basis and was therefore not unconstitutional, and (2) probationary provisions of statute establishing evaluative criteria and procedure for certificated employees did not apply to provisional teacher.

Affirmed.

1. Constitutional Law ⇐277(2)

There is no constitutional "property" interest in public employment.

2. Constitutional Law ⇐277(1)

Property interests are defined by rules which stem from state law.

3. Schools ⇐133.7

Provisional teacher did not have a fundamental property right to employment which requires that provisional employees statute be measured by strict scrutiny test; rather, applicable review standard was three-pronged rational basis test. West's RCWA 28A.67.072.

4. Constitutional Law ⇐278.5(3)
Schools ⇐133.7

Provisional employees statute, which applied alike to all first-year teaching or noncertificated employees in school district, had a rational basis and was therefore not unconstitutional. West's RCWA 28A.67.072.

5. Schools ⇐133.11

Probationary provisions of statute establishing evaluative criteria and procedure for certificated employees did not apply to provisional teacher. West's RCWA 28A.67.065, 28A.67.072.

6. Statutes ⇐181(1), 184

In interpreting a statute it is duty of court to ascertain and give effect to intent and purpose of legislature.

7. Statutes ⇐223.2(1)

Statutes in pari materia must be construed together in ascertaining legislative intent in order to give each statute meaning and validity.

8. Statutes ⇐212.1

Legislature is presumed to be familiar with its prior enactments when creating a new statute.

9. Statutes ⇐181(2)

No construction should be given to a statute which leads to absurdity.

10. Schools ⇐133.15

School district was not contractually bound to apply the dictates of statute establishing evaluative criteria and procedure for certificated employees prior to nonrenewal

of contract of provisional teacher West's RCWA 28A 67 065 28A 67 072

11. Schools ⇐141(5)

Provisional high school teacher whose contract was not renewed, who made no showing that school board exceeded its jurisdiction or that the proceedings were erroneous, void, or contrary to common law, was not entitled to a writ of certiorari authorizing review of school board's action West's RCWA 7 16 040

Kelly Hancock, R J Sloan Jr, Omak, for appellant

William E Garnett, Oroville, for respondent

McINTURFF, Chief Judge

Erik Hopp appeals the denial [illegible] of certiorari to review a decision of the Oroville School District No 410 (District) That decision precluded renewal of his contract after his initial year of teaching in the District.

Mr Hopp was hired by the District to teach at Oroville High School during the 1979–80 school year. On November 27, 1979, within the first 90 days of the employment period, an evaluation report on Mr Hopp was made by the principal of Oroville High School The District's evaluation policy includes evaluation criteria required by RCW 28A 67 065[1] including instructional skill classroom management professional preparation and scholarship, effort toward improvement when needed, handling student discipline, interest in teaching knowledge of subject matter and personal qualities The evaluation noted various areas of deficiency and suggested means of improvement[2]

On March 10 Mr Hopp was given an annual evaluation report by Principal Motta This report again noted deficiencies in various areas and a lack of improvement from the prior evaluation On May 13, 1980, the superintendent of the school district advised Mr Hopp in writing of his decision not to renew the teaching contract for the 1980–81 school year, listing reasons for the determination and advising him of procedures for requesting reconsideration of the decision On May 16, 1980, Mr. Hopp's attorney advised the superintendent by letter of a request for an informal meeting to present evidence for reconsideration. The meeting was held on May 28, 1980; present were Mr. Hopp and his attorney,

1. RCW 28A.67 065 states in part

'(1) The superintendent of public instruction shall, on or before January 1, 1977, establish and may amend from time to time minimum criteria for the evaluation of the professional performance capabilities and development of certificated classroom teachers and certificated support personnel For classroom teachers the criteria shall be developed in the following categories Instructional skill; classroom management, professional preparation and scholarship, effort toward improvement when needed; the handling of student discipline and attendant problems, and interest in teaching pupils and knowledge of subject matter Such criteria shall be subject to review by November 1, 1976, by four members of the legislature, one from each caucus of each house, including the chairpersons of the respective education committees

"

"It shall be the responsibility of a principal or his or her designee to evaluate all certificated personnel in his or her school. During each school year all classroom teachers and certificated support personnel, hereinafter referred to as "employees in this section shall be observed for the purposes of evaluation at least twice in the performance of their assigned duties

'Every employee whose work is judged unsatisfactory based on district evaluation criteria shall be notified in writing of stated specific areas of deficiencies along with a suggested specific and reasonable program for improvement on or before February 1st of each year A probationary period shall be established beginning on or before February 1st and ending no later than May 1st. The purpose of the probationary period is to give the employee opportunity to demonstrate improvements in his or her areas of deficiency Lack of necessary improvement shall be specifically documented in writing with notification to the probationer and shall constitute grounds for a finding of probable cause under RCW 28A.58.-450 or 28A 67 070, as now or hereafter amended

2. The record does not contain a copy of Mr Hopp's evaluations. Since no error was assigned to the court's findings relative to the evaluations we adopt them as verities

the District superintendent, Mr. Motta, and counsel for the District. Mr. Hopp presented letters from several fellow teachers and other supporters in addition to a memorandum of legal authority. On June 3, 1980, the superintendent recommended nonrenewal of the contract to the Oroville School Board.

On June 10, 1980, the board of directors convened to consider the matter. Mr. Hopp was again present and represented by two attorneys who submitted additional arguments on Mr. Hopp's behalf. At a special meeting on June 17, 1980, the Board voted not to renew Mr. Hopp's teaching contract and notified him of their decision.

Mr. Hopp subsequently filed a petition for writ of certiorari asking the Okanogan Superior Court to review the school district's proceedings. The court filed findings of fact and conclusions of law denying the petition and dismissed the action with prejudice.

On appeal, Mr. Hopp claims RCW 28A.67.072,[3] the provisional employee statute, is violative of his due process and equal protection rights. We disagree.

[1–3] Initially, we note our courts have held there is no constitutional "property" interest in public employment. *Giles v. Department of Soc. & Health Servs*, 90 Wash.2d 457, 461, 583 P.2d 1213 (1978). Property interests are defined by rules which stem from state law. *Bishop v. Wood*, 426 U.S. 341, 96 S.Ct. 2074, 48 L.Ed.2d 684 (1976); *State ex rel. Swartout*

3. RCW 28A.67.072 states:

"Notwithstanding the provisions of RCW 28A.67.070 as now or hereafter amended, every person employed by a school district in a teaching or other nonsupervisory certificated position shall be subject to nonrenewal of employment contract as provided in this section during the first year of employment by such district. Employees as defined in this section shall hereinafter be referred to as 'provisional employees'.

"In the event the superintendent of the school district determines that the employment contract of any provisional employee should not be renewed by the district for the next ensuing term such provisional employee shall be notified thereof in writing on or before May 15th preceding the commencement of such school term, which notification shall state the reason or reasons for such determination. Such notice shall be served upon the provisional employee personally, or by certified or registered mail, or by leaving a copy of the notice at the place of his or her usual abode with some person of suitable age and discretion then resident therein. The determination of the superintendent shall be subject to the evaluation requirements of RCW 28A.67.065, as now or hereafter amended.

"Every such provisional employee so notified, at his or her request made in writing and filed with the superintendent of the district within ten days after receiving such notice, shall be given the opportunity to meet informally with the superintendent for the purpose of requesting the superintendent to reconsider his or her decision. Such meeting shall be held no later than ten days following the receipt of such request, and the provisional employee shall be given written notice of the date, time and place of meeting at least three days prior thereto. At such meeting the provisional employee shall be given the opportunity to refute any facts upon which the superintendent's determination was based and to make any argument in support of his or her request for reconsideration.

"Within ten days following the meeting with the provisional employee, the superintendent shall either reinstate the provisional employee or shall submit to the school district board of directors for consideration at its next regular meeting a written report recommending that the employment contract of the provisional employee be nonrenewed and stating the reason or reasons therefor. A copy of such report shall be delivered to the provisional employee at least three days prior to the scheduled meeting of the board of directors. In taking action upon the recommendation of the superintendent, the board of directors shall consider any written communication which the provisional employee may file with the secretary of the board at any time prior to that meeting.

"The board of directors shall notify the provisional employee in writing of its final decision within ten days following the meeting at which the superintendent's recommendation was considered. The decision of the board of directors to nonrenew the contract of a provisional employee shall be final and not subject to appeal.

"This section applies to any person employed by a school district in a teaching or other nonsupervisory certificated position after June 25, 1976. This section provides the exclusive means for nonrenewing the employment contract of a provisional employee and no other provision of law shall be applicable thereto, including, without limitation, RCW 28A.67.070, and chapter 28A.88 RCW, as now or hereafter amended."

v. Civil Service Comm'n, 25 Wash.App. 174, 182, 605 P.2d 796 (1980). Thus, Mr. Hopp, as a provisional teacher under RCW 28A.67.072, does not have a fundamental property right to employment which requires us to measure the questioned statute by the strict scrutiny test.[4] Consequently, the applicable review standard is the three-pronged rational basis test of *Equitable Shipyards, Inc. v. State*, 93 Wash.2d 465, 478, 611 P.2d 396 (1980):

> (1) Does the classification apply alike to all members within the designated class? (2) Does some basis in reality exist for reasonably distinguishing between those within and without the designated class? (3) Does the classification have a rational relation to the purpose of the challenged statute?

[4] First, we find RCW 28A.67.072 applies alike to all first-year teaching or non-certificated employees in the District. Second, a probationary period under this statute is a legitimate precondition to bestowing benefits of public employment. *Ross v. Department of Soc. & Health Servs.*, 23 Wash.App. 265, 271, 594 P.2d 1386 (1979). Last, a rational basis exists because of the need for a probationary period in which an employer may observe the performance of the probationary employee prior to conferral of a continuing contract under RCW 28A.67.070 with its elaborate procedural system. The rational purpose behind RCW 28A.67.072 was to afford a means of assuring effective teachers and proper education. *See generally State ex rel. Swartout v. Civil Serv. Comm'n, supra*, 25 Wash.App. at 179–80, 605 P.2d 796. The statute passes constitutional muster.

[5] Next, Mr. Hopp argues the Board acted illegally by failing to apply the probationary provisions under RCW 28A.67.065.[5] He maintains these probationary provisions are preconditions to nonrenewal of teaching contracts, whether the teacher is provisional or otherwise.

[6–8] In interpreting a statute it is the duty of the court to ascertain and give effect to the intent and purpose of the legislature. *In re Lehman*, 93 Wash.2d 25, 27, 604 P.2d 948 (1980). Statutes in *pari materia* must be construed together in ascertaining legislative intent in order to give each statute meaning and validity. *Kirk v. Miller*, 83 Wash.2d 777, 522 P.2d 843 (1974). Mr. Hopp correctly points out that RCW 28A.67.065 predated RCW 28A.67.072. The legislature is presumed to be familiar with its prior enactments when creating a new statute. *Baker v. Baker*, 91 Wash.2d 482, 486, 588 P.2d 1164 (1979). RCW 28A.67.072 states in part:

> This section provides the *exclusive* means for nonrenewing the employment contract of a provisional employee and *no other provision of law* shall be applicable thereto . . .

(Italics ours.) Because the foregoing provision followed RCW 28A.67.065, we believe the legislature did not intend the probationary requirements of the latter statute be applied to provisional teachers. RCW 28A.67.072 merely refers to section .065 to insure the determination by the superintendent is subject to the evaluation requirements of that section. No mention is made in section .072 of probation requirements under section .065.

[9] Although the probationary period set out in section .065 refers to "every employee whose work is judged unsatisfactory" the legislature, in the same paragraph, noted that "[l]ack of necessary improvement shall be specifically documented in writing . . . and shall constitute grounds for a finding of probable cause under . . . RCW 28A.67.070 [tenured employee statute], as now or hereafter amended." The legislature made no mention of nonrenewal under RCW 28A.67.072 which is good reason to believe the probationary requirements of

4. If the statute or rule creates an inherently suspect classification such as is based upon race, nationality or alienage, when challenged, it will be subject to strict judicial scrutiny. The enactment would not be upheld under such an analysis unless the state establishes a compelling interest. *Nielsen v. Bar Association*, 90 Wash.2d 818, 820, 585 P.2d 1191 (1978).

5. *See* note 1.

RCW 28A.67.065 do not apply to provisional teachers. Additionally, we note the provisional teacher's entire first year *is* a probationary period, which would make the placement of Mr. Hopp on probation illogical and redundant. No construction should be given to a statute which leads to absurdity. *Wilson v. Lund*, 74 Wash.2d 945, 447 P.2d 718 (1968).

Consequently, we find RCW 28A.67.072 requires only that the superintendent's determination not to renew a provisional employee's contract be made in accordance with the evaluation criteria set forth in RCW 28A.67.065. There is no requirement that provisional employees be placed on probation on or before February 1 of the school year as a precondition for nonrenewal. Having determined the District complied with the evaluation criteria, we find no error.[6]

[10] Finally, Mr. Hopp maintains the District is contractually bound to apply the dictates of RCW 28A.67.065 because of a certificated employees evaluation policy between certificated employees and the Oroville Education Association. Section 5.1 of that policy provides that an unsatisfactory performance report shall include a program designed to assist the employee in improving his performance.

Our review of the above policy fails to disclose a specific reference to probation programs for provisional employees. We will not read such a requirement into the policy. However, we note Mr. Hopp signed a contract as a provisional certified teacher with the Oroville School District. That contract provided in part:

> This contract is subject to nonrenewal by the District in the first year of employment in accordance with chapter 223, Laws of 1969, ex. sess. as last amended and added to by section 1, chapter 114, Laws of 1976, 2nd ex. sess.

(RCW 28A.67.072). The face of the contract between Mr. Hopp and the District clearly evidences an intent that nonrenewal would be governed by the provisions of section .072.

Although we see no harm in the District's formulating a specific program to aid provisional employees in overcoming deficiencies, it is up to the legislature, not the courts, to decide on the wisdom and utility of legislation. *Ferguson v. Skrupa*, 372 U.S. 726, 83 S.Ct. 1028, 10 L.Ed.2d 93, 95 A.L.R.2d 1347 (1963).

Having decided the foregoing issue we next address the dismissal of Mr. Hopp's writ of certiorari.

[11] The grounds for granting a writ of certiorari are contained in RCW 7.16.040:

> A writ of review shall be granted by any court, except a police or justice court, when an inferior tribunal, board or officer, exercising judicial functions, has exceeded the jurisdiction of such tribunal, board or officer, or one acting illegally, or to correct any erroneous or void proceeding, or a proceeding not according to the course of the common law, and there is no appeal, nor in the judgment of the court, any plain, speedy and adequate remedy at law.

Although the superior courts are vested with inherent authority to review a controversy under a writ of certiorari, a threshold showing must be made of one of the

6. Mr. Hopp's reliance on *Wojt v. Chimacum School Dist. 49*, 9 Wash.App. 857, 516 P.2d 1099 (1973), and *Van Horn v. Highline School Dist. 401*, 17 Wash.App. 170, 562 P.2d 641 (1977) is misplaced. He concedes Wojt was not a first-year teacher and was discharged under RCW 28A.58.100. Additionally, *Wojt* was decided before the enactment of RCW 28A.67.072. Van Horn, likewise, was not a first-year teacher. The conclusion reached in *Wojt* was that a failure of a teacher to substantially correct work-related deficiencies subsequent to a probationary period may be used to constitute "sufficient cause" for discharge. *Wojt, supra*, 9 Wash.App. at 862, 516 P.2d 1099; *Potter v. Richland School Dist. 400*, 13 Wash.App. 316, 322, 534 P.2d 577 (1975). The term "sufficient cause" only relates to the "tenured teacher statute", RCW 28A.67.070, not to the mere statement of reason(s) under the "provisional teacher statute", RCW 28A.67.-072. Had Mr. Hopp been other than a first-year provisional teacher, solely governed by the dictates of RCW 28A.67.072 as discussed above, the probational requirements of RCW 28A.67.065 would be applicable.

grounds set forth above. Mr. Hopp has made no showing the Board exceeded its jurisdiction or that the proceedings were erroneous, void, or contrary to common law. The court, finding no violation of law or contract, properly denied review under the writ.

The judgment of the superior court is affirmed.

GREEN and ROE, JJ., concur.

31 Wash.App. 193

Sandra Lee HALSTED, formerly Sallee, Respondent,

v.

Donald Eugene SALLEE, Appellant.

No. 4191-III-3.

Court of Appeals of Washington, Division 3, Panel 4.

Jan. 21, 1982.

Former wife sought modification of former husband's visitation rights. The Superior Court, Okanogan County, B. E. Kohls, J., entered judgment terminating all parental rights of former husband, enjoining former husband from personal contacts of any nature with any member of former wife's present family, including his two minor children, and restricting his travel during pendency of case. Former husband appealed. The Court of Appeals, Roe, J., held that: (1) where no petition was filed seeking termination of former husband's parental rights and determination of parental rights took place without due notice to husband, termination would be reversed, and (2) restriction on travel imposed on former husband was an unconstitutional prohibition of former husband's right to travel.

Affirmed in part and reversed in part.

1. Constitutional Law ⇐274(5)

A parent's right to control and to have custody of his children is a fundamental civil right which may not be interfered with without the complete protection of due process safeguards.

2. Infants ⇐194

Termination of former husband's parental rights, made in proceeding on former wife's petition for modification of visitation rights, in absence of petition seeking such termination, in absence of due notice to husband, and in absence of finding that statutory requisites for termination of parental rights had been established by clear, cogent and convincing evidence was invalid and would be reversed. West's RCWA 13.34.010 et seq., 13.34.090, 13.34.110, 13.34.120, 13.34.180(1-6), 13.34.190.

3. Constitutional Law ⇐242.1(1)

The right to travel is a fundamental right protected by the equal protection clause of the Fourteenth Amendment. U.S. C.A.Const.Amend. 14.

4. Constitutional Law ⇐213.1(2)

Where fundamental rights are involved, regulations limiting these rights may be justified only by a compelling state interest.

5. Constitutional Law ⇐255(1), 278(1.1)

Procedural due process demands that a deprivation of life, liberty or property be preceded by notice and opportunity for hearing appropriate to the nature of the case.

6. Constitutional Law ⇐251.6

To be consonant with demands of procedural due process, notice and opportunity for hearing appropriate to nature of the case must be granted at a meaningful time and in a meaningful manner.

7. Constitutional Law ⇐251.6

An order based on a hearing in which there was not adequate notice or opportunity to be heard is void.

Jean LEONARD, Appellant (Plaintiff),

v.

CONVERSE COUNTY SCHOOL DISTRICT NO. 2, Appellee (Defendant).

No. 89-102.

Supreme Court of Wyoming.

March 13, 1990.

Initial contract teacher brought action challenging termination of contract. The District Court, Converse County, William A. Taylor, J., granted school district's motion for summary judgment, and teacher appealed. The Supreme Court, Macy, J., held that: (1) school district's evaluation rules did not provide protection for initial contract teacher from dismissal, and (2) neither implied covenant of good faith and fair dealing nor public policy exception to the employment-at-will doctrine apply to termination of employment contract between school districts and initial contract teachers.

Affirmed.

Golden, J., filed an opinion concurring in part and dissenting in part in which Urbigkit, J., joined.

1. **Schools** ⇐147.6

School district's evaluation policy did not protect initial contract teacher from dismissal, as the teacher could be dismissed even after receiving favorable evaluations. W.S.1977, § 21-7-109.

2. **Schools** ⇐147.6

Although teacher's contract and statutes incorporated school district's evaluation policy and regulation, those rules did not create a contractual right of employment for initial contract teacher. W.S. 1977, § 21-7-109.

3. **Master and Servant** ⇐30(1.10, 1.15)

Implied covenant of good faith and fair dealing and public policy exception to the employment-at-will doctrine serves as exceptions to the employment-at-will doctrine by granting an employee greater rights to sue his employer for termination of his employment.

4. **Schools** ⇐147.6

Implied covenant of good faith and fair dealing and public policy exception to the employment-at-will doctrine do not apply to termination of employment contracts between school districts and initial contract teachers

5. **Schools** ⇐147.6

School district's decision to terminate employment of a teacher without tenure must not violate constitutionally protected interest.

Patrick E. Hacker, Cheyenne, for appellant.

J.N. Murdock of Reeves & Murdock, Casper, and Mark R. Stewart of Hickey & Evans, Cheyenne, for appellee

Before CARDINE, C.J., and THOMAS, URBIGKIT, MACY and GOLDEN, JJ.

MACY, Justice.

Appellant Jean Leonard commenced an action against Appellee Converse County School District No. 2, seeking reinstatement as a counselor, recovery of damages, and attorney's fees. The suit arose from the Converse County School Board's decision not to offer Leonard a contract as a continuing contract teacher after she had completed three years of employment as an initial contract teacher. The School District moved for a summary judgment, which the district court granted.

We affirm.

Leonard raises the following issues for our review:

1. Whether it is arbitrary and capricious for a school district to discharge an employee for reasons contrary to fundamental state policy?

2. Whether it is arbitrary and capricious for a school district to discharge a teacher by a procedure which violates the district's own rules and regulations?

3 Whether Appellant established a proper cause of action for breach of an express contract?

4 Whether Appellant established a proper cause of action for breach of the implied covenant of good faith and fair dealing?

5 Whether a teacher has a cause of action for breach of a statutory duty?

6 Whether Appellant has established a valid claim for violation of substantive constitutional rights?

7 Whether Appellant has established a claim for violation of due process?

8 Whether material issues of fact exist as to each of the claims precluding summary judgment?

The materials submitted in support of and in opposition to the School District's motion for summary judgment reveal the following facts In the fall of 1982, Leonard began working for the School District as a guidance counselor at the Glenrock Middle School The School District hired Leonard as an initial contract teacher, and she worked as such for three consecutive years [1] During Leonard's employment, the School District maintained a policy and regulation prescribing an evaluation procedure The policy stated that all professional staff would be evaluated to ensure a quality educational program, and it defined the specific areas which would be evaluated The regulation required that the program and procedure for the evaluations and a written summary of expected standards be presented to the staff within two weeks of the beginning of the school year It also contained provisions for informal and formal probationary periods for teachers with unsatisfactory evaluations. Both the regulation and Wyo Stat § 21–3–110(a)(xvii) (1977) required that initial contract teachers be evaluated in writing twice a year and receive copies of their evaluations

In 1983, Leonard received a copy of her evaluation which indicated she needed improved professional rapport The following year, her evaluation noted improved rapport and indicated that all areas of performance were satisfactory During her third year as a counselor, Leonard was not evaluated, and, through a letter dated March 15, 1985, the School District informed Leonard that it would terminate her initial contract at the end of the school year Leonard was never placed on probation under the terms of the evaluation regulation

Leonard filed a grievance with the School Board, seeking renewal of her contract. After a hearing, the School Board denied Leonard's request, and on September 5, 1986, she filed a complaint with the district court The complaint alleged that the School District and its employees (1) breached a legal duty owed to Leonard by failing to follow the evaluation and probationary procedures set out in Wyo Stat. §§ 21–3–110(a)(xvii) and 21–3–111(a)(vi)(B) (1977) and in its policies and regulations; (2) denied Leonard procedural due process at her grievance hearing and failed to provide her with sufficient reasons for her dismissal, (3) discriminated against her because of her sex and marital status; (4) retaliated against her because of her personal life, (5) violated her substantive due process rights by arbitrarily and capriciously dismissing her; (6) denied her right to academic freedom, (7) violated her right to continued employment; and (8) breached the implied covenant of good faith and fair dealing Leonard sought reinstatement, damages, and attorney's fees under 42 U S C §§ 1983, 1988, and 2000 (1982). Leonard also sought reinstatement and damages for the School District's negligence, breach of contract, and violation of her constitutional rights.

The School District answered, generally denying the allegations, and filed a motion for summary judgment. The School District's memorandum in support of its mo-

1. Wyo Stat § 21–7–102(a)(iv) (1977) defines an initial contract teacher as "[a]ny teacher who has not achieved continuing contract status." A continuing contract teacher is "[a]ny initial contract teacher who has been employed by the same school district in the state of Wyoming for a period of three (3) consecutive school years, and has had his contract renewed for a fourth consecutive school year" Wyo.Stat. § 21–7–102(a)(ii)(A) (1977).

tion maintained that it was entitled to a judgment as a matter of law because Leonard as an initial contract teacher, had no entitlement to or reasonable expectation of reemployment On April 12, 1989, the district court granted a summary judgment in favor of the School District In its decision letter the court, relying upon *Roberts v Lincoln County School District Number One* 676 P 2d 577 (Wyo 1984), stated that Leonard was an 'untenured" initial contract teacher whose employment was properly terminated The court further explained that the School District's administrative rules could not abrogate the School Board's authority to terminate the employment of initial contract teachers[2] This appeal arose from that decision

The party moving for a summary judgment has the initial burden of establishing that no genuine issue of material fact exists and that summary judgment should be granted as a matter of law If the movant establishes a prima facie case, the burden shifts to the party opposing the motion to present specific facts showing a genuine issue of material fact does exist Conclusory statements or mere opinions are insufficient to satisfy an opposing party's burden *Nelson v Crimson Enterprises, Inc*, 777 P 2d 73 (Wyo 1989), *Jones Land and Livestock Co v Federal Land Bank of Omaha*, 733 P 2d 258 (Wyo 1987)

Leonard contends that the School District's decision not to offer her a new contract was arbitrary and capricious because the School District failed to follow the evaluation requirements set out in its policy, its regulation, and § 21–3–110(a)(xvii) In *Roberts*, 676 P 2d 577, this Court upheld a school district's decision to terminate the employment of an initial contract teacher despite its failure to follow required evaluation procedures We explained

> The only statutory requirement for terminating an initial contract teacher is that [the teacher] be notified of the termination no later than March 15 of each year An initial contract teacher has no statutory right to a statement of reasons for termination or to a hearing They do not have a claim, entitlement, or reasonable expectation of re-employment. Therefore they do not have a property interest under state law or otherwise

Id at 579 (footnote omitted)[3] This Court also stated that the evaluation regulations established by the district did not alter the initial contract teacher's rights because they 'were primarily for the benefit of the school district in performing its operational and supervisory duties" *Id* at 581

[1] In this case the School District argues that it adopted the evaluation policy primarily for use in performing operational and supervisory duties and not for the primary purpose of protecting initial contract teachers We agree The evaluation rules did not protect initial contract teachers from dismissal because, as teachers without tenure, they could be dismissed even after receiving favorable evaluations *Id.* In addition, the policy stated that the primary purpose for teacher supervision and evaluation was to develop staff and improve teaching We hold that even if the evaluation rules had a secondary purpose relating to termination or retention, they did not give initial contract teachers a claim to, entitlement to, or reasonable expectation of reemployment. *Id.* at 580 (citing *Willis v Widefield School District No 3*, 43 Colo App 197, 603 P 2d 962 (1979)) The School District's failure to follow the evaluation requirements did not result in an arbitrary and capricious decision to terminate Leonard's employment.

Leonard also asserts that the School District's policy and regulation were incorporated into her employment contract and that the School District breached the con-

2. Wyo Stat § 21–7–105 (1977) provided.

> An initial contract teacher who has taught in the system continuously for a period of at least ninety (90) days shall be hired on an annual basis and shall be notified in writing of termination if such is the case, no later than March 15 of each year
>
> This section was amended in 1987 by substituting 'April for "March"

3. In 1987 the legislature changed the date in Wyo.Stat § 21–7–109 (1977) from March 15 to April 15

tract by failing to follow them [4] In *Roberts*, 676 P 2d 577, this Court addressed the same breach of contract issue which was premised on similar contractual provisions We held that, "[a]lthough the contract is specifically subject to the 'policies, rules, and regulations of the school district,' these particular provisions did not operate to afford appellant any contractual right of employment" *Id.* at 582 We also stated that the board could not abrogate its statutory authority to terminate initial contract teachers *Id.*

[2] In this case, Leonard's contract and Wyo Stat. § 21-7-112 (1977) incorporated the evaluation policy and regulation, but those rules did not create a contractual right of employment. A contrary result would be in conflict with a school district's authority to terminate the employment of initial contract teachers Wyo Stat § 21-7-105 (1977), *Roberts*, 676 P 2d 577 Section 21-7-112 specifically states that school district policies, rules, and regulations cannot be in conflict with Wyoming laws Thus, we hold that the School District's violation of its evaluation policy and regulation and of § 21-3-110(a)(xvii) did not constitute an actionable breach of contract.

[3] Leonard also asks this Court to adopt and apply the implied covenant of good faith and fair dealing and the public policy exception to the employment-at-will doctrine Both theories serve as exceptions to the employment-at-will doctrine by granting an employee greater rights to sue his employer for termination of his employment *Nelson*, 777 P 2d 73, *Wagenseller v Scottsdale Memorial Hospital*, 147 Ariz 370, 710 P 2d 1025 (1985) This Court has previously held that the implied covenant of good faith and fair dealing does not apply to at-will employment relationships because either party may terminate an at-will contract for any reason, without reason, or for the wrong reason *Mobil Coal Producing, Inc v Parks*, 704 P 2d 702 (Wyo 1985) We have recognized a limited cause of action to vindicate the public policy of compensating workers for work-related injuries *Griess v Consolidated Freightways Corporation of Delaware*, 776 P 2d 752 (Wyo 1989) [5]

[4] We now hold that the implied covenant of good faith and fair dealing and the public policy exception to the employment-at-will doctrine do not apply to the termination of employment contracts between school districts and initial contract teachers The adoption of these theories would alter the tenure status of initial contract teachers defined in Wyo Stat. § 21-7-109 (1977) and explained in *Roberts*, 676 P 2d 577 The power to modify that status belongs to the legislature

Leonard's remaining arguments relate to her claim that the School District's decision not to offer her a fourth contract was made

4. The following two contract provisions apply to Leonard's assertion

> 4 It is understood and agreed between the parties that this contract is subject to the applicable laws of the State of Wyoming, the duly adopted rules of the State Board of Education and the policies of this District which are, by reference, incorporated herein and made a part of this agreement the same as if fully set forth herein.
>
> * * * * * *
>
> 6. Any person signing a contract for a fourth consecutive full school year shall be placed on a renewable contract status pursuant to Section 21-7-102, Education Code of 1969 as amended, 1981

Wyo.Stat. § 21-7-102(a)(ii) (1977) states in pertinent part

> "Continuing Contract Teacher"—(A) Any initial contract teacher who has been employed by the same school district in the state of Wyoming for a period of three (3) consecutive school years and has had his contract renewed for a fourth consecutive school year[ ]

Wyo Stat § 21-7-112 (1977) provides.

> The contracts of all teachers in the state of Wyoming from and after the effective date of this act shall be subject to the policies, rules, and regulations of the school district *not in conflict with this law or the other laws of the state of Wyoming*

(Emphasis added)

5. In *Griess*, 776 P 2d at 754, we held that an employee

> whose employment is terminated for exercising rights under the worker's compensation statutes and who is not covered by the terms of a collective bargaining agreement has a cause of action in tort against the employer for damages.

on the basis of constitutionally impermissible grounds Leonard contends that she is entitled to relief under 42 U S C § 1983 (1982) because the School District terminated her employment due to her marital status, her residency her personal life and the fact that she reported incest cases to government agencies [6]

[5] Leonard correctly states that a school district s decision to terminate the employment of a teacher without tenure must not violate constitutionally protected interests *Perry v Sindermann* 408 U S 593, 92 S Ct 2694, 33 L Ed 2d 570 (1972), *Roberts*, 676 P 2d 577 To prevail under this principle however, Leonard must first meet her burden in opposing the School District's motion for summary judgment *Jones Land and Livestock Co*, 733 P 2d 258 In *Nelson*, 777 P 2d at 77, we stated that "[e]vidence opposing a summary judgment that is conclusory or speculative is insufficient and the trial court has no duty to anticipate possible proof In opposition to the School District's motion Leonard presented the depositions of the Glenrock Middle School principal, the school district superintendent, and five school board members After reviewing those depositions, we conclude that Leonard failed to demonstrate the existence of a genuine issue of material fact which would preclude summary judgment as a matter of law The materials supporting Leonard's contention that the School District terminated her employment in violation of her constitutionally protected rights were merely speculative and conclusory Hence, the School District is entitled to a judgment as a matter of law

Affirmed

GOLDEN, J , filed an opinion concurring in part and dissenting in part in which URBIGKIT, J , joined

GOLDEN Justice, concurring in part and dissenting in part, in which URBIGKIT J joins

Although I concur in most aspects of the majority opinion I dissent from that part of it that holds that "the public policy exception to the employment at will doctrine [does] not apply to the termination of employment contracts between school districts and initial contract teachers "

This court identified the rationale supporting the public policy exception to the at will rule in *Allen v Safeway Stores, Incorporated* 699 P 2d 277, 284 (Wyo 1985)

> A tort action premised on violation of public policy results from a recognition that allowing a discharge to go unredressed would leave a valuable social policy to go unvindicated

As it was so aptly put by the Arizona Supreme Court in *Wagner v City of Globe*, 150 Ariz 82, 722 P 2d 250, 255–56 (1986),

> [e]mployees should not have to choose between their jobs and the demands of important public policy interests • • • [E]mployees should not be discharged because they performed an act that public policy would encourage • • •

A fundamental principle of Wyoming's public policy is our commitment to protect children from abuse or neglect. If a school district can decide not to renew a school counselor s employment contract based in substantial part on that counselor's fulfilling a statutory obligation of reporting suspected child abuse and neglect and of cooperating with law enforcement authorities and child protection agencies, then very soon that school counselor will stop reporting and cooperating The unacceptable end result is that child abuse and neglect will go unreported and children will continue to be harmed

Wyoming's clearly defined and well-established public policy concerning child

6. Leonard also asserts that the School District deprived her of her property right in continued employment without due process in violation of the fourteenth amendment to the United States Constitution This argument has no merit because we have determined that Leonard, as an initial contract teacher, did not have a claim to, entitlement to, or reasonable expectation of reemployment.

Wyo Stat § 14–3–205 (1977) imposes a duty to report cases of child abuse and neglect

abuse finds expression in W S 14-3-104 through 215 (July 1986 Repl) In particu lar § 14-3-205(a) provides that any person who has reasonable cause to suspect that a child has been abused or neglected shall immediately report it to the child protection agency or local law enforcement agency Under § 14-3-205(b) if a staff member of a school suspects child abuse or neglect, that staff member shall notify as soon as possible a person in charge who is also responsible to report the matter But the reporting staff member is not relieved of his or her obligation to report in the first instance Under § 14-3-212, the creation of multi-disciplinary child protection teams within the communities in the state is encouraged Among the members of that team is a designated representative from the school district. The local child protec tion teams are to facilitate diagnosis and prognosis and provide an adequate treat ment plan for the child and the child's family Under § 14-3-214, a child counselor employed by the school may attend interviews of a child that are conducted on school property by law enforcement personnel or child protective agency personnel

School counselors and teachers in particular are serving in the trenches in our society's war against child abuse Any chilling of that obligation to report and cooperate cannot be tolerated Our children are much too precious and valuable a resource to be sacrificed in the name of the "at-will" doctrine We have recognized and adopted a public policy exception for the worker who files a worker s compensation claim *Griess v Consolidated Freightways Corporation of Delaware*, 776 P 2d 752 (Wyo 1989) This court surely has the courage to recognize and adopt a public policy exception which will inure to the benefit of abused and neglected children

Keeping this public policy in mind, our fidelity to the bedrock principles of summary judgment law requires us to examine the record in the light most favorable to Ms Leonard, the party against whom the summary judgment was entered, and give her the benefit of all favorable inferences which reasonably can be drawn from the record evidence

The record evidence surrounding the reasons for principal Dodd's recommendation that Ms Leonard's employment contract not be renewed shows the following

1 Leonard's deposition testimony

- And Mr Dodd * * * said to me, something about don t discover any more incest cases and he kind of laughed And I guess I had a little difficulty with that I didn t think it was very funny * * * I felt that he really meant it * * * .

2 Dodd's deposition testimony

- When asked if he intended that Ms Leonard should not work with incest and abuse matters and alcoholic parents Dodd testified, "It would be my intent that [she] recognize the limit to which a school counselor can do that and still do the normal things * * * "
- When asked if she did more for abused children than Dodd wanted her to do, Dodd testified, 'I would have to say in terms of the total context of the job she spent more time with them than could be provided within the school setting at the expense of the other group of students '
- When asked if the special cases were taking more time than Dodd felt she could afford as a counselor, Dodd answered, "Unfortunately yes "
- Against the backdrop of the amount of time involved in reporting abuse cases and in cooperating with investigations by the law enforcement authorities in such cases, Dodd testified, "For the way all of this impacted upon the total school program, it was my professional judgment that too much time was being spent there."

3 Assistant school superintendent Hoyt's deposition testimony

- In early March, Hoyt asked Dodd to explain why he did not recommend Ms Leonard for renewal of her contract. Hoyt testified, "If I can recall his phrasing, there was a lack of balance between dealing with those more severe cases and what he perceived as

being her major responsibility as far as a school counselor was concerned."

• According to Hoyt, Dodd's reasons for his nonrenewal recommendation were her need to listen, her rapport with other staff members, and the "balance."

After reviewing the record and evidence in the light most favorable to school counselor Leonard and being of the view that Wyoming has a clearly defined and well-established public policy regarding the reporting of child abuse and neglect and of cooperating with the authorities in such matters, I find that genuine issues of material fact exist concerning the school district's reasons for failing to renew Ms. Leonard's contract. I would reverse and remand for a jury trial on that issue.

Susan A. ARLAND, Petitioner (Defendant),

v.

STATE of Wyoming, Respondent (Plaintiff).

No. 89–145.

Supreme Court of Wyoming.

March 15, 1990.

Defendant petitioned for a writ of certiorari, challenging the trial court's refusal to rule on a motion for reduction of sentence. The Supreme Court, Urbigkit, J., held that the trial court had a reasonable amount of time to rule on a timely motion for reduction of sentence, even if the motion had not been decided within 120 days after imposition of sentence.

Remanded.

1. After the record was filed in this court, it was supplemented by court order authorizing Ar-

Criminal Law ⇐996(2, 3)

Trial court has "reasonable time" to rule on motion for reduction of sentence which is filed within 120 days after imposition of sentence, even if motion is not decided within 120 days after sentence. Rules Crim.Proc., Rule 36.

Leonard D. Munker, State Public Defender and M. David Lindsey, Cheyenne, for petitioner.

Joseph B Meyer, Atty. Gen., John W. Renneisen, Deputy Atty. Gen., Karen A. Byrne, Senior Asst. Atty. Gen., Theodore Lauer, Director of Prosecution Assistance Program, and Philip W. Jussel, Student Intern, for respondent.

Before CARDINE, C.J., and THOMAS, URBIGKIT, MACY and GOLDEN, JJ.

URBIGKIT, Justice.

This appeal involves the prospective-retrospective status of changes this court has made by amendments to the Wyoming Rules of Criminal Procedure. Specifically addressed is W.R.Cr.P. 36 (similar to the prior F.R.Cr.P. 35) relating to authority of the trial court to alter or amend a criminal sentence after entry.

Petitioner, Susan A. Arland, plead guilty to embezzlement and larceny by bailee in taking money from her employer, The Learning Center of Teton County, as offenses charged in multiple counts. On March 27, 1987, she was sentenced to confinement at the Wyoming Women's Center for a term of three to five years and required to make restitution of $38,889.83, which was "reduced to judgment" by the sentence. Arland, thirty-nine and divorced, had a fourteen year old daughter and no previous criminal involvement.

On July 7, 1987, Arland moved for a sentence reduction premised on a favorable report from the women's confinement institution. The county attorney objected and the formal official record then ends without any action on her motion.[1] After receipt of

Procedure, § 609, fn 14, p 207 (12th ed 1976)

[3] In this case the sentencing judge had all the pertinent information before him He listened to the appellant, his attorney, and several character witnesses, he had the benefit of a presentence report The statute to which appellant pled guilty allows for a sentence not to exceed five years The judge sentenced appellant to a period within that statutory maximum and gave his reasons therefor We cannot say that this was a clear abuse of discretion

We affirm

Shirley ROBERTS, Appellant (Plaintiff),

v.

LINCOLN COUNTY SCHOOL DISTRICT NUMBER ONE, Appellee (Defendant).

No. 83–125.

Supreme Court of Wyoming.

Feb 16, 1984.

Initial contract teacher appealed from the decision of the District Court, Lincoln County, John D Troughton, J, upholding the school board's decision to terminate her. The Supreme Court, Cardine, J., held that: (1) initial contract teacher had no statutory right to a statement of reasons for termination, or to a hearing, and had no claim, entitlement, or reasonable expectation of employment, or a property interest under state law or otherwise; (2) even if evaluation of teacher had been performed, as required by school board regulations, and had been favorable, teacher would not have been protected against an arbitrary or capricious discharge, (3) such policy of evaluations did not give teacher a constitutionally protected property right in the renewal of her contract and, therefore, failure to follow such policy did not affect decision to terminate, (4) such policy of evaluation did not operate to afford teacher any contractual right of employment, and (5) teacher did not meet her burden of proving that her termination was caused by impermissible reasons or that constitutionally protected rights were involved

Affirmed

1. Schools ⇐141(5)

An initial contract teacher has no statutory right to a statement of reasons for termination or to a hearing, and has no claim, entitlement, or reasonable expectation of reemployment, and, therefore, does not have a property interest under state law or otherwise W S 1977, § 21–7–105

2. Schools ⇐55

School board is the governing body of the school district and has wide discretion in the management of school affairs.

3. Schools ⇐55

Supreme Court will interfere with school board actions if they are arbitrary and capricious or fraudulent, however, such Court will not otherwise substitute its judgment and, absent abuse, will not interfere with the exercise of discretionary acts authorized by statute

4. Administrative Law and Procedure ⇐416

In some circumstances, agencies may depart from their own regulations

5. Schools ⇐141(4)

Even if teaching evaluation had been performed, as contemplated in school board policy, and had been favorable, initial contract teacher would not have been protected against an arbitrary or capricious discharge since such teachers can be dismissed for no reason at all.

6. Schools ⇐141(4)

If an initial contract teacher can be dismissed for no reason at all, such teacher

can be dismissed without reasons supported by facts

7 Schools ⇐141(5)

School board's policy that evaluations should be made of all teachers did not give initial contract teacher a constitutionally protected property right in the renewal of her contract since such policy, which was violated by the school board established evaluative policies not designed for the protection of nontenured teachers that is, their purpose was not termination or retention, but were primarily for the benefit of the school district in performing its operational and supervisory duties, failure to follow such policy did not affect decision to terminate teacher

8. Administrative Law and Procedure ⇐763

Although agency should be aware of its regulations and such regulations should be followed, in order to invalidate an agency's decision, regulation in question must have some connection with the decision

9. Schools ⇐141(5)

Only requirements that school board must satisfy before terminating an initial contract teacher, are that the teacher must be notified no later than March 15 of each year and hearing must be provided if there is an allegation that teacher's constitutional rights have been violated W S 1977, § 21-7-105

10. Schools ⇐141(5)

School board's termination of initial contract teacher was proper where it notified such teacher no later than March 15 and hearing was provided in the event she alleged that her constitutional rights had been violated. W S.1977, § 21-7-105.

11. Schools ⇐141(5)

Although initial contract teacher's contract was specifically subject to the policies, rules and regulations of the school district, her termination because of difficulty in her coaching assignments was proper, even though the school board regulation requiring evaluation of teachers was not followed by the school board prior to her termination where no particular rule or regulation of the school district required evaluation of teacher in the coaching duties, and failure to evaluate her in such duties could not and did not matter since the specific provision that an initial contract teacher could be dismissed at the discretion of the school board with or without cause was controlling

12. Schools ⇐141(2)

School board cannot abrogate its statutory power to terminate nontenured teachers by contract

13 Schools ⇐141(4)

Lack of tenure does not, in itself, defeat a claim that decision to terminate was based upon impermissible violations of constitutionally protected interests

14 Civil Rights ⇐13.13(1)

While a nontenured teacher may not be terminated from employment for exercising a constitutional right of free speech, that person has burden of proving that the speech or conduct was constitutionally protected U S C A Const.Amend. 1.

15. Constitutional Law ⇐82(12)

Academic freedom concerns constitutionally protected rights and does not give teacher the right to have discipline problems nor to be protected from termination merely because such teacher was not aware that the administrators were dissatisfied with the direction of teacher's coaching program U.S C.A Const.Amend. 1.

16. Civil Rights ⇐13.13(3)

Initial contract teacher did not meet burden of proving that her termination was caused by impermissible reasons nor that constitutionally protected rights were involved where there was no evidence she was terminated for any protected activity but evidence showed she was terminated because she could not handle the discipline and morale problems of her sports teams. U S C A Const.Amend. 1.

Patrick E Hacker of Graves, Hacker & Phelan, Cheyenne, for appellant.

Dennis L Sanderson, Afton for appellee

Before ROONEY, C J THOMAS ROSE and CARDINE, JJ and RAPER, Justice, Ret

CARDINE, Justice

This appeal is from a judgment upholding the Lincoln County School Board's decision to terminate the employment of appellant We will affirm

The issues, as stated by appellant, are

"1 Is a decision of a school board made in violation of its own policies and rules arbitrary and capricious?

"2 Does a violation of school board policies incorporated into an employment contract, constitute an actionable breach of contract?

"3 Is the nonrenewal of an initial contract teacher for educational philosophies or methods without previous warning a violation of constitutionally protected rights?"

Appellant, Shirley Roberts, was employed by the Lincoln County School District No One in 1977 as a physical education teacher and the high school girls volleyball and basketball coach During her second year of teaching, she experienced difficulties as a basketball coach and was relieved of these duties Her third year of teaching involved coaching the high school volleyball team and the eighth grade girls basketball team During the third year, appellant ran into difficulties with the volleyball team The students who created problems on the volleyball team also created problems in one of appellant's P E. classes. The superintendent and principal evidently decided that it would be better to get a different physical education teacher who could handle both the P E classes and the coaching duties

Appellant was told by the superintendent that he was not going to recommend that her contract be renewed because he was not satisfied with the direction the coaching program was going The Board of Trustees accepted the superintendent s recommendation and sent appellant a letter formally notifying her of this decision The letter stated that as an initial contract teacher she was not entitled to a hearing upon the reasons for termination, but that she did have a right to a hearing on the issue of whether or not her constitutional or due process rights had been violated

Appellant asked for a hearing which was held before an independent hearing examiner who made proposed findings of facts and conclusions of law The Board of Trustees incorporated these findings into its decision and order Appellant appealed the board s decision to district court. In addition to the appeal, the appellant alleged breach of contract and a federal civil rights action The court announced its decision in favor of appellee on all counts

I

Whether the school board's decision was arbitrary and capricious

[1] Appellant contends that the school board had in effect a manual of Policies and Regulations which were not followed, and, therefore, their decision was prima facie arbitrary and capricious Appellant was an initial contract teacher The only statutory requirement for terminating an initial contract teacher is that they be notified of the termination no later than March 15 of each year [1] An initial contract teacher has no statutory right to a statement of reasons for termination or to a hearing. They do not have a claim, entitlement, or reasonable expectation of re-employment. Therefore, they do not have a property interest under state law or otherwise. *O'Melia v Sweetwater County School District No 1*, Wyo, 497 P 2d 540 (1972); *Schmidt v Fremont County School District No 25*, 406 F.Supp 781 (Wyo 1976),

1. Section 21-7-105 W.S 1977, provides
"An initial contract teacher who has taught in the system continuously for a period of at least ninety (90) days shall be hired on an annual basis and shall be notified in writing of termination, if such is the case, no later than March 15 of each year"

Bertot v School District No 1 Albany County, Wyoming, 522 F 2d 1171 (10th Cir 1975)

[2, 3] The school board is the governing body of the school district It has wide discretion in the management of school affairs *Hyatt v Big Horn School District No 4*, Wyo, 636 P 2d 525 (1981) The board has the power to employ teachers, § 21-3-111(a)(vi)(C), W S 1977 approve salary provisions, § 21-7-104 W S 1977, terminate initial contract teachers § 21-7-105, W S 1977, and suspend or dismiss teachers, § 21-7-110, W S 1977 We will interfere with school board actions if they are arbitrary and capricious or fraudulent, however, we will not otherwise substitute our judgment Absent abuse we will not interfere with the exercise of discretionary acts authorized by statute *Hyatt v Big Horn School District No 4*, supra

Appellant received one formal evaluation during the school year in which her contract was not renewed Although appellant did not have a property right to reemployment, she nevertheless contends that because policies and regulations of the school district requiring four evaluations during the school year [2] were not followed, the decision to terminate must be reversed

Appellant contends that the school district's failure to follow its own evaluative policies and regulations is patently arbitrary and capricious, and relies upon *Vitarelli v Seaton*, 359 U S 535, 79 S Ct. 968, 3 L Ed 2d 1012 (1959) for the proposition that when an agency promulgates regulations, a failure to act in accordance with the procedures set forth therein cannot be sustained We accepted this principle in *Keslar v Police Civil Service Comm'n, City of Rock Springs* Wyo 665 P 2d 937 (1983) Keslar and Vitarelli stand for the proposition that an individual whose status or position is being affected by agency action has the right to enforce those agency rules which were promulgated and designed to afford protection in the given situation

[4] However in some circumstances agencies may depart from their own regulations Thus

"* * * Most courts which have allowed departures have based their conclusions on findings that the regulation which was violated was intended to govern internal agency procedures, rather than to protect any interest of the objecting party * * *" (Footnotes omitted) 87 Harvard L Rev 629, Violations by Agencies of their own Regulations

Willis v Widefield School District No 3, 43 Colo App 197 603 P 2d 962 (1979), involved nontenured teachers and school district procedures which required teachers to be evaluated twice a year The policy stated that this requirement had the primary purpose of improving the quality of teaching and the secondary purpose of retention or dismissal The court held that a failure to follow the evaluation procedures did not

2. "EVALUATION OF PROFESSIONAL STAFF TEACHERS

"Formal valuations for nontenure teachers shall be made at least four times each year on forms to be provided The first two evaluations shall be completed before December, and the second two before March of each school year

* * * * * *

"The minimum basic procedures leading to formal evaluations of teachers shall include the following:

"1 The principal or his designated representative (assistant principal, district administrator and/or supervisor) shall visit each teacher in the classroom several times during each school year and shall record the general nature of visitations on a form to be provided, with a copy for the teacher and the principal All observations shall be conducted openly and with the full knowledge of the teacher A teacher or the principal or his designated representative may request a conference to discuss the visit

2 At least once each year in the case of tenure teachers, and *at least twice each year in the case of nontenure teachers*, the principal or his designated representative shall schedule a formal evaluative interview with each teacher prior to the evaluation deadlines established

* * * * * *

"Current practice codified 1978

Board approved and issued date of manual adoption

'School District No 1, Lincoln County, Kemmerer Wyoming" (Emphasis added)

invalidate a decision to terminate a nontenured teacher

The purpose for these evaluations is set forth in the manual of Policies and Regulations of School District No One under Evaluation of Professional Staff Teachers and is stated as

> " * * * to assist teachers to develop and strengthen their professional abilities through an assessment of strengths and weaknesses Teacher evaluation shall be a process through which the principal provides guidelines, suggests ways to overcome difficulties, makes commendations, and determines the progress of a teacher's professional performance Exceptional performance by a staff member should also be recognized on such occasion "

In this case, the regulations establishing evaluative policies were not designed for the protection of nontenured teachers such as appellant, but were primarily for the benefit of the school district in performing its operational and supervisory duties

[5-7] Their purpose was not termination or retention Even if the evaluations had been performed and been favorable, appellant would not have been protected against an arbitrary or capricious discharge If one can be dismissed for no reason at all, one can be dismissed without reasons supported by facts *Jeffries v Turkey Run Consolidated School District*, 492 F 2d 1 (7th Cir 1974) The policy that evaluations should be made did not give appellant a constitutionally protected property right in the renewal of her contract. See *Weathers v West Yuma County School District R-J-1*, 530 F 2d 1335 (10th Cir 1976)

[8] We recognize the policy that agencies should be aware of their regulations and that these regulations should be followed However, in order to invalidate an agency's decision, the regulation in question must have some connection with the decision Appellant was an initial contract teacher As such, she had no statutory or other legally protected property or interest in continuing employment We cannot find that the stated evaluation policies created a right and therefore the failure to follow them did not affect the decision to terminate

In the present situation evaluations were required for classroom teachers Appellant was dismissed for reasons concerning her outside duties as a coach She was not terminated for her classroom performance Appellant was relieved of her initial position as basketball coach because of difficulties In her third year of teaching, she experienced problems with the volleyball team These problems were characterized as morale and discipline problems The administrators evidently felt that they had a choice of relieving appellant of these duties also or of hiring a teacher who was adequate in both classroom performance *and* coaching abilities

The cases cited by appellant in support of her position can be easily distinguished They either involve tenured teachers (*Wojt v Chimacum School District No 49*, 9 Wash App 857 516 P 2d 1099 (1973), *Brininstool v New Mexico State Board of Education* 81 N M 319 466 P 2d 885 (1970)), or procedures specifically geared toward the purpose of termination (*Trimboli v Board of Education of Wayne County* W V , 280 S E 2d 686 (1981), *Lehman v Board of Education of City School District of City of New York*, 82 A D 2d 832, 439 N Y S 2d 670 (1981))

[9, 10] We find that the procedures concerning evaluation of probationary teachers are not related to the decision to retain or terminate a probationary teacher A separate section of the school district's rules and regulations apply specifically to the termination, suspension, or dismissal of teachers and pupils This section states that.

> "Section 2 *Termination of Initial Contract Teachers* The contract of an initial teacher may be terminated by the Board upon notification in writing of such termination by registered or certified mail to the last known address of such initial contract teacher no later than

March 15 of each year Proof of such written notice together with the proof of mailing shall be kept and retained in the records of the school district

he only requirements that the board must atisfy before terminating an initial con ract teacher is that the teacher must be otified no later than March 15 of each ear and a hearing must be provided if here is an allegation that the teacher s onstitutional rights have been violated The school district satisfied these requirenents and acted properly in the termina ion of appellant

II

Did the violation of these policies constitute an actionable breach of contract?

Appellant contends that the evaluation policies were incorporated into her teacher employment contract, and therefore, the school district s inaction regarding the evaluations resulted in a breach of contract The applicable contract provisions are

"3 DUTIES OF TEACHER The teacher shall perform all duties and services of a teacher faithfully and satisfactorily at the time, place and for the duration prescribed by the District, and as directed by the superintendent Teachers shall comply with and abide by all rules and regulations promulgated by the District and all pertinent statutes of the State of Wyoming as they now exist or may from time to time be adopted or modified *All such, rules, regulations and statutes are incorporated herein by this reference and are made a part of this agreement as if fully set forth.* * * *

* * * * * *

"5 TERMINATION Until a teacher obtains continuing contract status as defined by the Wyoming Teacher Employment Law, the teacher hereby acknowledges that he/she is employed on an annual probationary basis and has no expectation of re-employment. *An initial contract teacher's contract may not be renewed solely at the discretion of the board of trustees with or without cause.* Unless otherwise required by law an initial contract teacher is not entitled to a hearing upon the reasons for termination ' (Emphasis added)

Section 21-7-112 W S 1977 states that.

The contracts of all teachers in the state of Wyoming from and after the effective date of this act shall be subject to the policies, rules, and regulations of the school district not in conflict with this law or the other laws of the state of Wyoming

[11 12] Appellant contends that the policies and regulations are made part of her contract that they required evaluations that were not done and that the school district therefore, is in breach of contract. We cannot agree with this proposition Although the contract is specifically subject to the 'policies, rules, and regulations of the school district, ' these particular provisions did not operate to afford appellant any contractual right of employment.

In *Illinois Education Ass'n Local Community High School District 218 v Board of Education of School District 218 Cook County* 62 Ill 2d 127, 340 N E 2d 7 (1975), the court held that a collective bargaining agreement providing that discharge should be preceded by the faithful exercise of evaluations could not result in the school board delegating its discretionary powers of terminating probationary teachers The court stated that the reasons for terminating were not related to classroom teaching performance, and there was nothing in the agreement which restricted or expanded the rights of the nontenured teacher

Here, there are no particular rules or regulations requiring the evaluation of appellant in her coaching duties. Therefore, the failure to evaluate could not and did not matter The specific provision that an initial contract teacher can be dismissed at the discretion of the school board with or without cause is controlling. The board cannot abrogate its statutory power to terminate nontenured teachers by contract, and that did not occur here.

III

Whether appellant's termination is improper because it is based on the violation of constitutionally secured rights.

[13–16] The general rule is that the lack of tenure does not, in itself, defeat a claim that the decision was based upon impermissible violations of constitutionally protected interests. *Perry v. Sindermann*, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972). Appellant contends that her termination was improper because it infringed on the right of academic freedom. Appellant states:

> "There was nothing in the evaluative process or the contacts of the administrators to show the plaintiff that she was not meeting the standards of academic content or methodology apparently selected by the administrators."

Academic freedom concerns protected rights. There was no evidence that appellant was terminated for any protected activity; she was terminated because she could not handle the discipline and morale problems of the sport teams. While a non-tenured teacher may not be terminated from employment for exercising a constitutional right of free speech, that person has the burden of proving that the speech or conduct was constitutionally protected. *Schmidt v. Fremont County School District No. 25*, supra; *Buhr v. Buffalo Public School District No. 38*, 509 F.2d 1196 (8th Cir.1974).

Academic freedom involves:

> "* * * [T]he substantive right of a teacher to choose a teaching method which in the court's view served a demonstrated educational purpose, and the procedural right of a teacher not to be discharged for the use of a teaching method which was not proscribed by a regulation, and as to which it was not proven that he should have had notice that its use was prohibited." *Mailloux v. Kiley*, 323 F.Supp. 1387, 1390 (D.Mass. 1971).

Appellant misunderstands the applicable law. Academic freedom does not give one the right to have discipline problems nor to be protected from termination merely because appellant was not aware that the administrators were dissatisfied with the direction of the coaching program. Academic freedom concerns constitutionally protected rights. Appellant has not met the burden of proving that her termination was caused by impermissible reasons nor that constitutionally protected rights were involved.

For the reasons stated in this opinion the judgment appealed from upholding appellant's termination is affirmed.

ADDENDUM B

NONRENEWAL OF TEACHER CONTRACTS: A PRIMER ON SOUTH DAKOTA STATUTORY AND CASE LAW

MELISSA R. O'ROURKE†

TABLE OF CONTENTS

I. INTRODUCTION

In the state of South Dakota, there are 178 public school districts

† J.D., University of South Dakota, 1993; editor-in-chief, 38 S.D. L. REV. (1992-1993); law clerk to Honorable George W. Wuest, S.D. S. Ct. (1993-94).

"substantial evidence" and "clearly erroneous" standards.[197] First, the court must determine whether there is "substantial evidence to support the school board's decision. Substantial evidence means such relevant and competent evidence as a reasonable mind might accept as adequate to support a conclusion."[198] Next, the court determines whether the school board decision was clearly erroneous by examining the evidence supporting the school board's decision.[199] Applying a clearly erroneous standard requires that the court determine "not whether we would have made the same decision as the school board, but whether, after reviewing the entire record, we are left with the definite and firm conviction that a mistake has been committed."[200] Under the clearly erroneous standard, the supreme court is not bound by any presumption that the circuit court's decision was correct.[201]

1. Application of the First Prong—Procedural Legality

a. Board Compliance With Adopted Rules

The supreme court has stated that policies, rules, and regulations duly adopted by a school board have the "force of law"[202] and " 'are as binding as if they were statutes enacted by the Legislature.' "[203] Quite simply, the court has held that "a school board must comply with its own rules."[204]

i. Teacher Evaluation Policies

There are two major areas that spawn the question of whether a board has complied with its own policies. One of these areas involves teacher evaluations as related to nonrenewal of a teacher's contract.[205] In *Dale v. Board of Education*,[206] a tenured teacher claimed that the school board failed to adequately comply with its own evaluation policy prior to its decision to not renew his contract.[207] The board-adopted policy was that teachers should be evaluated every third year for the purpose of " 'improvement of the quality of instruction.' "[208] The teacher had last been evaluated in

197. *Riter*, 504 N.W.2d at 576.
198. *Id.* (quoting Oldham-Ramona Sch. Dist. v. Ust, 502 N.W.2d 574, 581 (S.D. 1993) (citations omitted)).
199. *Id.*
200. *Strain*, 447 N.W.2d at 338 (citing *Tschetter*, 302 N.W.2d at 47; *In re* South Lincoln Rural Water Sys., 295 N.W.2d 743, 745 (S.D. 1980)).
201. *Id. See also Tschetter*, 302 N.W.2d at 46; *Moran*, 281 N.W.2d at 600. Under this prong, the reviewing court must review the evidence to determine whether the board's decision was clearly erroneous. For discussion of challenges relating to sufficiency of evidence, see *infra* notes 244-77 and accompanying text.
202. *Nordhagen*, 474 N.W.2d at 512 (citing *Dale*, 316 N.W.2d at 113; *Schnabel*, 295 N.W.2d at 341; *Schaub*, 339 N.W.2d at 310).
203. *Schnabel*, 295 N.W.2d at 341 (quoting Douglas County Welfare Admin. v. Parks, 284 N.W.2d 10, 11 (Neb. 1979)).
204. *Nordhagen*, 474 N.W.2d at 512. *See also Sutera*, 351 N.W.2d at 458; *Ward*, 319 N.W.2d at 504.
205. As stated previously, school boards must adopt a teacher evaluation policy. S.D.C.L. § 13-43-26. For text of the statute, see *supra* note 22.
206. 316 N.W.2d 108 (S.D. 1982).
207. *Id.* at 113.
208. *Id.*

May 1977, and was terminated in April 1980; his next formal evaluation was not due until May 1980.[209] Since his next formal evaluation was not due until after the date the board made its nonrenewal decision, the court agreed that it was not necessary to complete the review.[210] The teacher further argued that he should have been evaluated anyway, apparently asserting that he was without knowledge of his teaching problems.[211] The court disagreed, finding sufficient evidence in the record that the teacher was "fully cognizant" of his own deficiencies.[212]

In *Schaub,* a nontenured, nonrenewed teacher sought reinstatement to her position based on allegations that the school board did not follow its own rules in regard to teacher evaluations.[213] The court stated that it was unclear whether the board had violated any of its own evaluation policies, but that it was clear from the record that Schaub knew "that the Board was concerned with certain deficiencies in her teaching."[214] In any event, the court reiterated a test with regard to reinstatement under these circumstances:

> [A] violation by the Board of a rule does not in and of itself justify reinstatement of the teacher. The test in determining whether reinstatement is the proper remedy for a violation of teacher evaluation statutes is "whether a grievant has shown that the violation substantially and directly impaired his or her ability to improve himself or herself and attain continuing contract status."[215]

The court held that since Schaub had prior knowledge of her deficiencies, and had ample opportunity to correct them before her termination notice, any violation by the school board of teacher evaluation policies did not "substantially or directly impair" the teacher's ability to improve herself.[216]

A recent case, *Nordhagen,* also addresses compliance with a teacher evaluation policy.[217] The board had adopted a policy stating, in pertinent part, that "[a] recommendation against continued employment may not be given without two formal evaluations and a *written plan of assistance.*"[218] Nordhagen argued that the plan of assistance must be a separate, written document; while the board's position was that the written plan could be contained within the two formal evaluations.[219] The court found that it was "clear from the record that the superintendent stood ready at all times to

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209. *Id.*
210. *Id.*
211. *Id.* at 113-14.
212. *Id.* The court noted that the teacher had met "numerous times" with the board, as well as with administrators, concerning his teaching methods. *Id.* at 114.
213. *Schaub,* 339 N.W.2d at 309-10.
214. *Id.* at 310.
215. *Id.* (quoting *Fries,* 307 N.W.2d at 879).
216. *Id.*
217. *Nordhagen,* 474 N.W.2d at 512-13.
218. *Id.* at 512.
219. *Id.* Within the first written evaluation was a statement indicating that Nordhagen (a principal) and the evaluator (a superintendent) "must have a conference within 30 days after the recommendation to develop a written plan to implement the actions stated in the recommendation." *Id.* at 513.

meet" and develop a separate, written plan; however, the terminated employee had "refused to cooperate in developing this formal plan of assistance."[220] The court affirmed the school board's nonrenewal decision, making special note that "Nordhagen frustrated Board's written policy by his failure to cooperate."[221]

ii. Staff Reduction Policies

School districts generally adopt policies regarding staff reductions and how terminations or changes in teaching assignments will be conducted, should that become necessary in a district. In *Schnabel v. Alcester School District No. 61-1,*[222] a tenured teacher was terminated as part of a staff reduction.[223] The teacher appealed to the circuit court, which found that the board had abused its discretion and violated its own staff reduction policy.[224] As with most staff reduction policies, the policy in question set out a series of priorities as to what teachers should be released first.[225] An exception was allowed " 'where an individual staff member is needed to maintain an existing program.' "[226] Schnabel, a tenured math teacher, was terminated, while the district retained an nontenured English major "who was otherwise qualified to teach math."[227] The board maintained that this decision was allowed under the "existing program" exception.[228] Agreeing that the evidence showed otherwise, the supreme court affirmed the circuit court's decision that the school board had abused its discretion by violating its own policy.[229]

Reduction of a tenured teacher's full-time position to half-time also comes within the protection of the continuing contract law. In *Ward v. Viborg School District No. 60-5,*[230] the teacher alleged that the school board violated its own staff reduction policy when her position was reduced to half-time.[231] Although the board contended that it need not afford any procedural due process to the teacher, the court noted that the board's own policy "clearly accepts the responsibility of adhering to SDCL 13-43-10 and SDCL 13-43-10.1 whenever a tenured teacher's contract is affected by staff reduction."[232] It was undisputed that the board failed to comply with the due process dictates of those statutes.[233] Thus, the supreme court affirmed

220. *Id.*
221. *Id.*
222. 295 N.W.2d 340 (S.D. 1980).
223. *Id.*
224. *Id.* at 340-41.
225. *Id.* at 341.
226. *Id.*
227. *Id.* at 342.
228. *Id.*
229. *Id. See Sutera,* 351 N.W.2d at 459 (holding that the school board was compelled by its own staff reduction regulations to renew the contract of a tenured teacher with 13 years' experience rather than retain a nontenured teacher).
230. 319 N.W.2d 502 (S.D. 1982).
231. *Id.* at 503.
232. *Id.* at 504.
233. *Id.*

ADDENDUM C

DEPARTMENT OF EDUCATION
REGION VIII
FEDERAL OFFICE BUILDING
1244 SPEER BLVD., SUITE #310
DENVER, COLORADO 80204-3582

APR 9 1993

OFFICE OF THE REGIONAL DIRECTOR
OFFICE FOR CIVIL RIGHTS

Re: 08921156

Ms. Dianna L. Broadbent
127 North 400 West
Smithfield, Utah 84335-2720

Dear Ms. Broadbent:

The U.S. Department of Education, Office for Civil Rights (OCR), has completed its investigation of the complaint you filed against the Cache County School District (District), a recipient of Federal financial assistance from the Department. The investigation was conducted pursuant to Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. § 794 and its implementing regulation at 34 C.F.R. § 104.61, as it incorporates 34 C.F.R. § 100.7(e) and Title II of the Americans with Disabilities Act of 1990 (Title II), 42 U.S.C. § 12134 and its implementing regulation at 28 C.F.R. § 35.140(a) and (b)(2), as it incorporates 29 C.F.R. § 1630.12(a).

You alleged that the District retaliated against you by refusing to renew your employment contract. Specifically, you alleged that the District took this action after you participated in an evaluation team decision to classify a student as eligible for special education services, contrary to the expressed wishes of District officials.

During its investigation, OCR examined District policies and procedures, other pertinent documents and interviewed you, District administrators, faculty and other staff. Based on our findings, we have determined that the District did not retaliate against you and is in compliance with Section 504 and Title II. The bases for our conclusions are summarized below.

Background:

You were employed as a provisional special education teacher with the District for three years, from 1989-92. From approximately October 1991 to February 1992, you acted as the case coordinator for a student, (JB), who was referred for a special education evaluation. During that time a series of staffing meetings were held at which the team discussed JB. The District Director for Special Education Services (Director) and the Psychologist stated that in their opinion, psycho-educational testing showed that JB was not eligible for special education services.

At an IEP meeting on February 25, 1992, attended by several members of the team, youself, and JB's parent, a decision was made to place JB into special education and an IEP was signed. The Psychologist and the Director stated they did not attend because they were not notified of this meeting. You and another special education teacher, the Head of the Department at the school, stated that one week after the IEP was signed, you were called into the Principal's office and the Director angrily informed you that you should have followed her recommendation. Both the Director and the Principal recall discussing the placement decision with you and the teacher on that date but deny that any threatening or angry statements were made.

You stated that on March 31, 1992, you were notified that your contract would not be renewed and you would not be offered a tenured teaching position. You alleged that the District did not renew your contract in retaliation for the placement decision.

You filed an internal grievance which was denied upon appeal. During the investigation, District administrators stated that you were not offered a tenured teaching position because of you "philosophy and attitude" of special education and because of your "disruptive" style in advocating for placement of students into special education.

Legal Standard:

The regulations implementing Section 504 at 34 C.F.R. § 104.61 as it incorporates 34 C.F.R. § 100.7(e), and Title II at 28 C.F.R. § 35.140 as it incorporates 29 C.F.R. § 1630.12(a), provide that no recipient or other person shall intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by Section 504 or Title II, or because she or he has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding or hearing under these regulations. Activities protected by this section include asserting a right for disabled students.

In the investigation of a retaliation allegation, OCR considers whether the complainant participated in a protected activity, whether the District was aware of the protected activity, whether the complainant suffered adverse action(s), and whether there is a causal connection between the protected activity and the adverse action of the recipient. If these elements are established OCR then considers whether the recipient has a legitimate, nondiscriminatory reason for its actions and whether such reason is a pretext for discrimination.

Protected Activity:

You acted as case coordinator for the evaluation of JB for special education services. The Director and Principal indicated that you advocated placing students in special education more often than they believed was appropriate. On February 25, 1992, you and other District staff agreed to place JB in special education despite the Director's and Psychiatrist's recommendation that JB not be serviced in special education. The special education department learned of the placement decision the following day.

OCR thus found that you raised issues of appropriate placement for students whom you believed to be in need of special education services at an IEP meeting and at other times. The placement of handicapped students is a District effort. Your disagreement with the District's efforts concerning appropriate placement constitutes a protected activity within the meaning of Section 504 and the ADA.

Adverse Action:

OCR obtained copies of District policies governing provisional employees (such as you) and the Utah Educator Evaluator Law which covers both provisional and tenured teachers. The District's policies state that provisional teachers are those with less than three years of successful teaching experience and are hired without the right of expectation of continued employment. These policies also provide that when a District intends to renew a provisional teacher's contract, notification will be made, where possible, at least two months before the end of the school year.

District policies are silent with regard to notification of nonrenewal of provisional teachers' contracts. Utah state law only requires 60 days advance notice for nonrenewal of tenured teachers' contracts. The Principal and the Director stated that their practice is to comply with that requirement even for nontenured teachers and notification of nonrenewal is given by April 1 or 60 days before the end of the school year.

The District notified you of its decision not to renew your contract on March 30, 1992. OCR thus found that you were given adequate notice of the nonrenewal of your contract.

OCR considered the evidence of adverse or differential treatment in connection with the nonrenewal of your contract. OCR reviewed the evaluations received by you during the three years you were employed by the District. You received good evaluations from the Principal, Assistant Principal and the Director. You received only one below standard rating from the Principal in March 1991. Your provisional contract was renewed for the first two years, but after the third year, only three and a half weeks after your participation in a team decision to qualify JB for special education, your contract was not renewed.

OCR found that eight other provisional teachers' contracts had not been renewed by the District since 1989. Two of these were special education teachers. One special education teacher chose to transfer to regular education. The second special education teacher received good evaluations in the first year, but mixed evaluations in her second year. However, the information in the files failed to document what personnel actions were taken in connection with problems in performance or evaluation. OCR thus found inconclusive evidence of differential treatment.

OCR nevertheless found that you received good evaluations by the District and your contract had previously been renewed without dispute. OCR thus found that the subsequent nonrenewal of the your contract qualifies as an adverse action under the regulations.

Proximate Cause:

OCR then sought to determine whether there is a causal connection between the protected activity and adverse action. A causal connection between the protected activity and the allegedly retaliatory adverse action is indicative of retaliatory intent and can be inferred from one or more of the following:

- Proximity in time between the District's learning of the protected activity and the initiation of the adverse action;

- A change in the District's treatment of you after learning of the protected activity;

- Deviation by the District from its established practices; or

- Disparate treatment of you when compared with similarly situated individuals.

As indicated above, OCR found that your actions on February 25, 1992, were a protected activity. The District learned of those actions the next day. On March 30 , 1992, only one month after the disagreement regarding JB's placement, the District notified you of

the adverse action, the nonrenewal of your contract. Thus, the adverse act shortly followed the protected activity. The nonrenewal of your contract also marked a change in treatment, because you had previously received good evaluations and contract renewals.

Because OCR found a proximity in time between the protected activity and adverse action and a change in treatment after the adverse action, OCR finds a causal connection between these acts.

Legitimate, Nondiscriminatory Reasons(s):

Having established a prima facie case of retaliation, OCR then considered whether the District can offer legitimate, nondiscriminatory reasons for its actions, and whether reasons offered are a pretext for retaliation.

Philosophy and Attitude

The Principal and the Director of Special Education stated that they made the decision not to offer you a tenured teaching position because of your educational "philosophy and attitude." The Director also stated that she did not believe there was any way to remediate your "attitude and philosophy." Both indicated that you advocated for the placement of more students into Special Education classes than they believed was necessary or appropriate. The Assistant Principal indicated that you had philosophical problems with the District and the Special Education staff's placement recommendations. They also indicated that your style of questioning and challenging special education placement decisions was at times disruptive.

As examples of disruptive behavior the Principal and Director stated you often required scheduling changes of IEP meetings, and challenged the Psychologist's testing results as part of your advocacy. They also stated that you invited all of the student's teachers to participate in IEP meetings as a means of intimidating the psychologist into classifying a student in need of special education.

OCR interviewed the other two special education teachers at your school and the Special Education Teacher's Aide, four regular education teachers, the Assistant Principal, the Psychologist, the Speech Therapist, and a school Counselor who variously described you as a good to exceptional teacher. When asked specifically about your philosophy, special education staff stated you acted out of concern for students.

The Principal stated that he spoke to you five or six times during your provisional period at the request of the Director, about problems he perceived with your attitude. You denied having

conversations with the Principal regarding dissatisfaction with your teaching. The Principal indicated that you did not make any changes in your behavior. The Principal further stated that he did not keep a written record of these meetings because you were a provisional teacher and he thought he was only required to document such information for tenured teachers.

The Director stated she only discussed her dissatisfaction with you with the Principal because she considered the Principal to be her supervisor. The Head of the Special Education department confirmed that she was not informed of any problems with your performance.

The Principal, Assistant Principal and the Director gave you letters of recommendation in April of 1992, with positive remarks. The Principal stated during his OCR interview that he thought you had trouble getting along with other teachers, despite his positive recommendations.

While OCR found that staff members considered that you acted out of concern for students, your methods and special education philosophy and attitude were considered disruptive or inappropriate by staff members including the Principal, the Director of Special Education, and the Assistant Principal. District staff explained that they did not document problems in your performance because you were hired without the right or expectation of continued employment. OCR found that an inconsistency between the District's and your approach or philosophy of special education is a legitimate, nondiscriminatory basis for the nonrenewal of your contract.

Scheduling

The Principal and the Director stated that you were, at times, disruptive and required "scheduling changes" for meetings that were inconvenient for staff. They presented no specific examples of incidents in which you were responsible for disrupting school staff by requiring scheduling changes. However, the Principal met with special education staff during school year 1991-92, and asked them to make scheduling requests through his office, rather than through you.

Special education staff remembered the Principal's directive but did not think that he gave the name of the individuals causing scheduling problems. The staff reported that meetings were thereafter scheduled by a special education aide. The aide noted that the Principal indicated he did not want you to schedule meetings directly so he could keep track of what you and other special education teachers were doing. Meetings were at times rescheduled by the aide to accommodate special education staff, the Psychologist and parents.

The Psychologist stated that she was not informed of the February 25, 1992 IEP meeting concerning JB. The aide and you stated that you had left a messages for the Psychologist at her office since she had attended previous meetings. The Psychologist stated that she never received such a message. The Director also stated that he was unaware of the meeting. Although it appears that scheduling procedures were not followed regarding JB's IEP meeting, OCR could not determine whether you interfered with this process.

OCR nevertheless found that the Principal expressed problems in entrusting special education scheduling to you and specifically requested that you be removed from this task. The legitimate and nondiscriminatory reason presented by the District was thus substantiated by our investigation.

IEP Results and Meetings

The Principal and the Director stated that you challenged the Psychologist's decisions when evaluating students for special education. The Psychologist confirmed that you often disagreed with her conclusions.

You stated that you were "surprised" by some decisions made with regard to the placement of special education students and you "inquired" about decisions. You denied that you ever argued or confronted the Director or the Psychologist over these decisions. Other special education staff acknowledged that you disagreed with some District staff, including the Director and Psychologist, but did not think you invited teachers to IEP meetings specifically for the purpose of pressuring the Psychologist.

OCR found that you challenged the findings and recommendations of the Psychologist and Director at IEP meetings. While some staff members expressed no problem with the practice, administrative staff disputed the appropriateness of this practice. OCR finds that the District presented a legitimate, nondiscriminatory basis for the nonrenewal of your contract based on perceived difficulties in accepting other staff members recommendations when you did not agree with those recommendations.

JB's Special Education Placement

The Principal, the Assistant Principal and the Director stated that the nonrenewal of your contract was not specifically attributed to the qualification of JB for special education. However, the District indicated that you did not follow appropriate procedures regarding JB's placement and qualification into special education.

District staff were in disagreement over JB's placement. The Psychologist and the Director stated that JB did not qualify for special education based on his test results, and that JB's problems

could be addressed through means other than special education. Other team members indicated that special education services were necessary to address JB's academic and social problems and that they wanted an opportunity to refute the testing results.

On February 17, 1992, several IEP staff members of the team expressed concern for JB in a letter to the Director. The Director responded by means of a memorandum dated February 25, 1992. The memorandum was addressed to each IEP team member and indicated that JB did not qualify for special education services, though the team could "override" test results with adequate data. An IEP meeting was held later that day, which placed JB in special education despite the Director's recommendation. The IEP was signed by all members present except for one of the two other attending special education teachers. The IEP meeting was held without the Director or Psychologist, who insisted that they were not notified of the meeting. You asserted that you were not aware that any procedures had been violated and believed to be acting in the best interests of the student.

The Director and the Psychologist stated that District policy required the presence of a psychologist at JB's IEP meeting. The Psychologist explained that State guidelines require the presence of a counselor, mental health worker or psychologist at IEP meetings. Based on those guidelines, the District requires that a psychologist be present at every initial placement, behavior disorder or self-containment determination. JB was identified as having a behavior disorder and placed in self-contained special education classes without her presence.

The Director stated that the requirement that a psychologist be present became effective in the District in 1990. You stated that you were unaware of this requirement. The Director indicated that teachers were informed of this change in policy during their training. Special education staff stated that they were aware that the Psychologist participated in many meetings, but her presence was not mandatory at every meeting.

In addition, the Psychologist and the Director stated that District policy requires a classification of behavior disorder (condition identified for JB) to be supported by three behavior observations. The observations were done to comply with this requirement only after the IEP was signed. You and other special education staff stated that they were unfamiliar with these requirements.

OCR found that you were the case coordinator for an IEP meeting which placed JB in special education without adherence to District procedural requirements. The failure to adhere to procedure is significant since only the Director or Psychologist were aware of all necessary requirements for making that placement decision.

This failure presents a legitimate, nondiscriminatory basis for the District's decision not to renew your contract.

The District thus presented legitimate, nondiscriminatory reasons for the nonrenewal of your contract. OCR found insufficient evidence to determine that the reasons presented were pretextual.

Conclusion:

Based on all the evidence reviewed, OCR has concluded that there is insufficient evidence to demonstrate that you were subjected to retaliation by the District. Accordingly, the District is in compliance with Section 504 and Title II of the ADA.

OCR is closing this complaint investigation as of the date of this letter. This letter addresses only the issues discussed and should not be interpreted as a determination of the District's compliance or noncompliance with Section 504 or Title II in any other respect.

Individuals filing a complaint or participating in an investigation are protected by Federal law against harassment, retaliation, or intimidation by 34 C.F.R. § 100.7(e).

The findings presented in this Letter of Findings have undergone a multi-level review for legal sufficiency and adherence to OCR policy. The manner in which we determined compliance and the facts to support that determination are set forth in the letter. If, after review of this letter, you believe that you have evidence that refutes the facts presented and that such evidence would alter the findings, you may request reconsideration of this determination. Requests for reconsideration must be submitted to this Office postmarked within 30 days of the date of this letter.

Please note that a request for reconsideration must:

1. specify which findings were based on incorrect information;

2. specify which relevant facts were not included in the findings; and

3. provide any evidence that will support the above.

A request for reconsideration cannot merely express general disagreement with our findings.

Under the Freedom of Information Act, it may be necessary to release this document and related correspondence and records upon request. In the event that OCR receives such a request, we will seek to protect, to the extent provided by law, personal information which, if released, could constitute an unwarranted invasion of privacy.

We wish to thank you for your assistance in the course of this investigation. If you have any questions regarding the findings or procedures addressed in this letter, you may call Mr. David Dunbar, Chief Regional Attorney, at (303) 844-5313.

Sincerely,

Cathy H. Lewis
Regional Director